Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 87-996

In the Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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Petitioner contends that the court of appeals erred in affirming a district court's dismissal of petitioner's suit against an insolvent federally insured savings association. A similar contention, involving essentially the same issues, is already pending before this Court in another petition for a writ of certiorari to the same court of appeals, *Zohdi v. FSLIC*, petition for cert. pending, No. 87-255 (filed Aug. 5, 1987). The petition in this case accordingly should be held for disposition in light of the Court's disposition of the petition in *Zohdi*.

1. From 1983 to 1986, petitioner received several loans from and engaged in other dealings with FirstSouth, F.A., a federal savings association. Petitioner and FirstSouth encountered difficulties in their relationship and, in October 1986, petitioner sued FirstSouth in state court for usury, breach of fiduciary duty, and breach of a duty of

good faith and fair dealing. Two months later, the Federal Home Loan Bank Board declared FirstSouth insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. See 12 U.S.C. (Supp. IV) 1464(d)(6)(A). FSLIC removed petitioner's suit to federal court and sought dismissal on the ground that petitioner's claims must be presented in FSLIC's administrative claims procedure. See 12 C.F.R. 549.4. The district court dismissed, relying on *North Mississippi Savings & Loan Ass'n* v. *Hudspeth,* 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986). See Pet. App. A1-A2, A5.

Petitioner appealed the district court's decision, contending that Congress had not given FSLIC authority to resolve state law claims against an insolvent thrift institution and that administrative resolution of those claims would violate various constitutional provisions. The court of appeals affirmed in a per curiam decision. The court rejected petitioner's statutory claims, relying on its previous decision in *Hudspeth,* as reaffirmed in *FSLIC* v. *Bonfanti,* 826 F.2d 1391 (5th Cir. 1987), petition for cert. pending *sub nom. Zohdi* v. *FSLIC,* No. 87-255; *Goodwin* v. *FSLIC,* 806 F.2d 1290 (5th Cir. 1987); and *Chupik Corp.* v. *FSLIC,* 790 F.2d 1269 (5th Cir. 1986). See Pet. App. A2. The court further noted that petitioner's constitutional arguments were not ripe for resolution (*id.* at A4).

2. The basic statutory question petitioner raises here—whether claims against an insolvent federally insured savings and loan association must be presented in the first instance in federal receivership proceedings in accordance with the Federal Home Loan Bank Board's regulations for the administrative resolution of such claims—is important and has divided the federal courts of appeals. Compare *North Mississippi Savings & Loan Ass'n* v. *Hudspeth, supra,* with *Morrison-Knudsen Co.* v. *CHG International, Inc.,* 811 F.2d 1209 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates,* No. 87-451. The question, however, is already pending before this Court in a previously filed petition for a writ of certiorari to the same court of appeals. See *Zohdi* v. *FSLIC,* No. 87-255. The Solicitor General has urged this Court to grant that petition, limited to the question as stated in the government's brief.[1] As for petitioner's constitutional objections, the court of appeals properly declined to decide them on the ground that they "are not ripe for resolution at this time" (Pet. App. A4). The court of appeals subsequently announced that it would hear argument on the constitutional questions in another case. See *Thomes* v. *Equitable Savings & Loan Ass'n,* 831 F.2d 558 (5th Cir. 1987). Thus, even if the constitutional issues warranted this Court's review, there is no occasion for the Court to consider those questions at this juncture.

It is therefore respectfully submitted that the petition in this case should be held pending disposition of the petition in No. 87-255 and then disposed of as appropriate.

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FEBRUARY 1988

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[1] The Solicitor General has also filed petitions for writs of certiorari to the Ninth Circuit raising the same question and has urged that those petitions should be held pending disposition of the petition in No. 87-255 and then disposed of as appropriate. See *FSLIC* v. *Stevenson Associates,* No. 87-451 (filed Sept. 17, 1987); *FSLIC* v. *Murdock-SC Associates,* No. 87-452 (filed Sept. 17, 1987).

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